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No. 78-710

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALLEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the court of appeals' decision affirming the district court's refusal to dismiss the indictment pending against him on double jeopardy grounds.

1. In the fall of 1977, petitioner was tried in the United States District Court for the Southern District of New York on a six-count indictment charging him with attempted tax evasion for each of the years 1970, 1971 and 1972, in violation of 26 U.S.C. 7201, and making false statements on the tax returns filed for those years, in violation of 26 U.S.C. 7206(1) (Pet. App. 3a). After 17 days of trial, the case was submitted to the jury on November 3, 1977 (*id.* at 5a). During its six days of deliberations, the jury made approximately 30 requests for further instructions and the rereading of testimony (*id.* at 22a). Late on the fourth day of deliberations, a Monday, the trial judge (Judge Metzner) sent a note to

the jury asking if it had reached, or could reach, a verdict on any count of the indictment. The jury responded: "Some feel there is no possibility of reaching a verdict on any of the counts as we appear to be deadlocked at this point. This, however, is not unanimous" (*id.* at 7a). The court then dismissed the jury until Wednesday, allowing the jurors time off for Election Day (*ibid.*).

On the beginning of the fifth day of deliberations, Judge Metzner decided to give the jury a modified *Allen* charge. He discussed this with counsel but rejected each of their respective proposals, choosing instead the modified *Allen* charge previously approved by the Second Circuit (Pet. App. 7a). The jury then requested that portions of the testimony and instructions be read again, but it retired for the evening without reaching a verdict. At 5:00 p.m. the following day the court called counsel into chambers, noted that jury deliberations had lasted for six full days and that an *Allen* charge had produced no results, and suggested that a second note be sent to the jury to inquire about the possibility of deadlock. Over petitioner's objections, Judge Metzner decided to make the further inquiry, and he received the following responses (*id.* at 8a):

Q. Are you deadlocked in your deliberations?

A. Yes.

Q. Have you reached a verdict on any count in the indictment?

A. No.

Q. If you have not reached a verdict as to any count in the indictment, is there a possibility that you can reach a verdict as to any count in the indictment?

A. Nine no; three yes.

At the government's request, the court then asked petitioner's counsel if he had any suggestions for alternatives to a mistrial. Petitioner offered no alternatives directly, taking the position that the jury was not deadlocked because the inquiry as to the status of their deliberations had been initiated by the court. Petitioner also repeated his requests for an additional instruction on corroboration nd a different *Allen* charge. After hearing these proposals, Judge Metzner concluded that the jury was hopelessly deadlocked and declared a mistrial (Pet. App. 8a-9a).

After the case had been reassigned to Judge Broderick for retrial, petitioner moved to dismiss the indictment, arguing that a second trial was barred by the Double Jeopardy Clause of the Fifth Amendment. Judge Broderick denied the motion, holding that, on the particular facts of this case, which included six days of jury deliberations, a modified *Allen* charge, and consideration of proposed alternatives to a mistrial, "Judge Metzner, with some 18 years' experience as a trial judge, had the authority to conclude within his discretion that there was a hung jury, necessitating the declaration of a mistrial" (Pet. App. 34a).[1] The court of appeals unanimously affirmed in a thorough opinion upon which we rely (*id.* at 1a-25a). Petitioner's application for a stay of the mandate of the court of appeals was denied by this Court on November 3, 1978 (No. A-382).

2. Petitioner does not challenge the settled rule that a retrial following the declaration of a mistrial granted over a defendant's opposition does not violate the Double

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[1]On January 19, 1978, Judge Broderick denied petitioner's motion for reconsideration, which raised a number of claims not presented in his initial motion (Pet. App. 36a-41a). Petitioner attempted to appeal the denial of these claims, but the court of appeals correctly held that it lacked jurisdiction to consider any arguments other than double jeopardy prior to trial (*id.* at 23a). See *United States* v. *MacDonald*, 435 U.S. 850 (1978).

Jeopardy Clause so long as there was a "manifest necessity" for the mistrial. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Gori* v. *United States*, 367 U.S. 364 (1961). Hence, the sole issue presented in this case is whether Judge Metzner abused his discretion in concluding that, in the particular circumstances of petitioner's first trial, the jury deadlock—"long considered the classic basis" for a finding of "manifest necessity" (*Arizona* v. *Washington*, 434 U.S. 497, 509 (1978))—required the declaration of a mistrial. Given the "great deference" accorded a trial judge's determination of these matters (*Arizona* v. *Washington*, *supra*, 434 U.S. at 510, 514), Judge Broderick and the panel of the court of appeals correctly concluded that Judge Metzner acted properly in light of the situation he faced.[2] As the court of appeals observed (Pet. App. 22a):

> The jury had been out for six full days; it had made approximately 30 requests for further instructions and testimony. It had heard crucial testimony read and reread; it had advised the court on two occasions that it was deadlocked; it deliberated for two full days after the delivery of an *Allen* charge. To have compelled further deliberations to resolve the relatively confined issue would have exhausted the jurors rather than the discussion.

[2]Three of the four judges who reviewed and upheld Judge Metzner's decision have had extensive trial experience in the federal courts. Judge Port, who wrote the court of appeals' opinion, has been a district judge for 14 years; Judge Feinberg, who joined the court's opinion, was a district judge for five years before his appointment to the Second Circuit; and Judge Broderick has been a district judge for two years. Furthermore, as Judge Broderick noted in denying petitioner's motion to dismiss, Judge Metzner's experience as a federal trial judge, dating back to 1959, surely put him in an excellent position to assess whether further deliberations by the jury would be likely to produce a verdict.

Indeed, this was a classic case of jury deadlock. As petitioner concedes (Pet. 5), the key to the jury's verdict was its assessment of the relative credibility of various witnesses, and the jurors obviously disagreed strongly on that matter. After nearly a week of debate, it is exceedingly improbable that additional deliberation on an issue so tinged with subjective perceptions would have been fruitful.

Finally, as noted by the court of appeals (Pet. App. 13a-19a), the decision below is not in conflict with the decisions of this Court or any other circuit. In each of the cases cited by petitioner to support his contention that Judge Metzner acted precipitously, either there was substantial evidence that the jury was not deadlocked or the trial judge took insufficient steps to ascertain the jury's status or to explore possible alternatives before declaring a mistrial. See, *e.g.*, *United States* v. *Evers*, 569 F. 2d 876, 879 (5th Cir. 1978); *United States* v. *Gordy*, 526 F. 2d 631, 636 (5th Cir. 1976); *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F. 2d 1034, 1043 (3d Cir. 1975); *United States* v. *Lansdown*, 460 F. 2d 164, 169 (4th Cir. 1972).[3] Here, by contrast, "the jury * * * was genuinely deadlocked," and "Judge Metzner adequately considered [petitioner's] suggested alternatives to a mistrial" (Pet. App. 20a).[4]

[3]*United States* v. *Horn*, 78-2 U.S.T.C., para. 9722 (10th Cir. Sept. 6, 1978), is similarly inapposite. In *Horn*, the trial judge declared a mistrial after less than six hours of deliberation by the jury and failed to inquire whether the jury was deadlocked or whether it could reach a verdict. Under those facts, the court of appeals found that there was "a complete lack of evidence that the jury was in disagreement at the time that the mistrial was granted" (*id.* at page 85,414), and it held that a retrial was barred by the Double Jeopardy Clause.

[4]There is no merit to petitioner's suggestion (Pet. 18-20) that Judge Metzner could not properly have concluded that the jury was "genuinely deadlocked" because three jurors thought there was a possibility that a verdict could be reached. It is far from clear from

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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the jury's note whether these three jurors were predicting that their colleagues would be willing to reconsider their positions or whether they merely were announcing that they still had an open mind about the case. In any event, as the court of appeals noted (Pet. App. 14a-15a), petitioner's argument ignores the fact that nine jurors informed the court that no agreement was possible. Although a jury verdict in the federal courts must be unanimous (*Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Andres* v. *United States*, 333 U.S. 740 (1948)), jury deadlock obviously need not be. Indeed, the unanimity requirement suggests that the statements of any *two* jurors of opposite views that they will never change their minds is sufficient to warrant a mistrial. Acceptance of petitioner's contention would mean that a single juror could prohibit a trial judge from declaring a mistrial over the defendant's opposition, even after weeks or months of deliberations, simply by refusing to agree that the jury was deadlocked—a throwback to the common law "confinement of the jury till death if they do not agree." *Arizona* v. *Washington*, *supra*, 434 U.S. at 506 n.21, quoting *Winsor* v. *The Queen*, L.R. 1 Q.B. 289, 390 (1866). We note that no juror indicated any disagreement with the judge's conclusion that the jury in fact was deadlocked, and petitioner made no request to poll the jury with respect to the prospect of reaching a verdict (Tr. 2889-2896).

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